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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE EDWARD KIMBALL, JR.,

Defendant and Appellant.

E068330

(Super.Ct.No. SWF1402919)

OPINION

APPEAL from the Superior Court of Riverside County. Stephen J. Gallon, Judge.
Affirmed in part; reversed in part with directions.

Gene D. Vorobyov, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant is serving 25 years to life in prison for a 2016 conviction for possessing child pornography and doing so as a registered sex offender, with two prior strike

convictions in Montana for felony sexual assault. Defendant argues, and the People agree, that this court should reverse the strike findings and remand for resentencing. This is because our Supreme Court, in *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), subsequently clarified that the trial court should have based its findings regarding the ages of the victims (i.e., under age 14) in the strike priors only on the facts of the prior convictions that were necessarily established by the prior convictions or admitted by defendant as part of his plea to sexual assault. However, defendant contends the trial court should resentence him without the impact of the three strikes law, whereas the People argue the court should hold a new trial on the status of the Montana convictions as strike priors under California law. We reverse the true findings on the two strike priors and direct the trial court to hold a new bench trial on the priors. In addition, the parties agree that the court should recalculate defendant's presentence custody credits.

FACTS AND PROCEDURE

On August 29, 1995, defendant signed a document entitled, "acknowledgment of waiver of rights by plea of guilty," in the Montana Eighth Judicial District Court, Cascade County. Although the date stamp is not clear, it appears to have been filed with that court on September 5, 1995. In this document, defendant pled guilty to two counts of felony sexual assault. Section 7 of the form has the preprinted statement: "The following are the facts which cause me to plead guilty. I believe I am guilty of these offenses because I did the following:" In the blank lines provided, the words "Alford plea" are written in by hand, but no factual description of the crimes appears.

In July 2014, content moderators for photobucket.com discovered that two accounts registered to defendant contained, between them, 8,800 images of child pornography. The Web site shut down defendant's accounts and reported them to the National Center for Missing and Exploited Children (NCMEC). NCMEC contacted the Riverside County Probation Department with this information. In October 2014, investigating officers searched defendant's home and recovered a laptop computer that contained approximately 7,000 images of suspected child pornography.

One of the investigating officers testified that in his opinion the children depicted in photographs introduced at trial ranged in age from infancy to 12 or 13 years of age.

On October 27, 2016, the People filed a first amended information alleging in count 1 that defendant possessed child pornography (Pen. Code, § 311.11, subd. (a))¹ and in count 2 that defendant possessed child pornography while being required to register as a sex offender (§ 311.11, subd. (b)). The People alleged as to each count that defendant possessed more than 600 images of child pornography, including 10 or more images involving a prepubescent minor under age 12, and images portraying sexual sadism with children under age 12. (§ 311.11, subd. (c)(1), (2).) The People also alleged that in 1996 defendant suffered two prior strike convictions in Montana that were equivalent to section 288, subdivision (a). (§§ 667, subds. (c), (e)(2)(A), & 1170.12, subd. (c)(2)(A).)

On April 1, 2016, defendant filed a motion under section 1118 to have the two strike priors dismissed because: (1) the Montana statute under which defendant was

¹ All further statutory references are to the Penal Code unless otherwise indicated.

convicted did not include the requirement that the victims be younger than age 14, as is required for a conviction of section 288, subdivision (a); and (2) the documents the People submitted to the court to establish the ages of two victims in the Montana priors were not part of the “record of conviction” and thus the People could not prove defendant had two prior strike convictions. On April 4, 2016, the court heard argument from both parties and denied the section 1118 motion. In particular, the court noted that People’s exhibit No. 3, which was entitled “Judgment of Conviction and Sentencing Order,” and stated that the victims in the two crimes were ages four and five, was the “actual judgment” of the court, rather than the “equivalent of a probation officer’s report,” and contained “the factual findings of the court upon which the court based her sentence.” The court then found the prior strike allegations true. Defendant waived his right to a jury trial and agreed to a bench trial on the current charges.

After a multi-day bench trial, the court found defendant guilty as charged on November 2, 2016.

On May 12, 2017, the court denied defendant’s invitation to strike one or both of defendant’s strike priors under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court cited the “egregious” nature of the photographs found on defendant’s photobucket.com accounts and laptop computer and noted that “many of those [were] of very small children.” The court then sentenced defendant to 25 years to life for count 2 and 25 years to life for count 1, but stayed the sentence for count 1 under section 654.

This appeal followed.

DISCUSSION

1. *Retrial on the Prior Strike Allegations*

The parties agree that, under *Gallardo, supra*, 4 Cal.5th 120, the trial court could not rely on People's exhibit No. 3, the "Judgment of Conviction and Sentencing Order" to establish that the victims of defendant's sexual assaults in Montana were under age 14.

California's child molestation statute in Penal Code section 288, subdivision (a), provides, "a person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body . . . of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony" In 1995, Montana's sexual assault statute stated that "[a] person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault." (Mont. Code Ann., § 45-5-502 (1994).) As the trial court noted, the California statute requires the victim to be under the age of 14 years, whereas the Montana statute has no age requirement. Thus, defendant could have violated the Montana statute without also violating the California statute, and without necessarily having committed a "strike."

In *Gallardo, supra*, 4 Cal.5th 120, after the defendant was convicted of numerous crimes, the trial court held a bifurcated bench trial on whether the defendant's prior assault conviction qualified as a serious felony. In order to make this determination, the trial court considered the preliminary hearing transcript of the prior conviction. Thereafter, the trial court ultimately found, based on its review of the transcript, that the defendant's prior assault conviction constituted a serious felony. (*Id.* at pp. 123-124.)

The Supreme Court held that such a review of the prior record of conviction violated the defendant's Sixth Amendment rights. Specifically, the Supreme Court held that a trial court's role in this regard is limited "to identifying those facts that were established by virtue of the conviction itself—that is, *facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea.*" (*Id.* at p. 136, italics added.) The Supreme Court remanded the matter to the trial court "to permit the People to demonstrate to the trial court, based on the record of the prior plea proceedings, that defendant's guilty plea encompassed a relevant admission about the nature of her crime." (*Id.* at p. 139.)

Here, the court inferred the ages of the victims from People's exhibit No. 3, which was entitled "Judgment of Conviction and Sentencing Order." This document was prepared by the court and dated and filed on June 21, 1996, more than nine months after defendant pled guilty. Under the rule in *Gallardo*, this document contains neither "facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Gallardo*, 4 Cal.5th at p. 136.) Neither does the "acknowledgement of waiver of rights by plea of guilty" that defendant executed establish the victims' ages or reference, as a factual basis, any document establishing the victims' ages to be under 14. Therefore, the essential facts necessary to make a true finding under the three strikes law are not properly established on this record as required by *Gallardo*. The true findings on the prior strike convictions must be reversed.

In this case, the proper remedy is to remand this matter in accordance with *Gallardo*—to allow the trial court to examine the record of the prior plea proceedings,

including the factual basis provided by defendant. (*People v. Barragan* (2004) 32 Cal.4th 236, 239 [retrial of strike allegation permissible when trier of fact found the allegation to be true and appellate court reversed that finding for insufficient evidence]; *People v. Jenkins* (2006) 140 Cal.App.4th 805, 816 [finding on strike & § 667, subd. (a)(1), allegations based on out-of-state conviction reversed for insufficient evidence; “these allegations may be retried if the prosecutor obtains additional evidence regarding the Utah robberies to establish that [the defendant] used force or fear against a person with a possessory interest in the property taken”]; *People v. Cortez* (1999) 73 Cal.App.4th 276, 284.) Although defendant argues it would be an idle act to remand for retrial of the prior strike convictions, we conclude remand is necessary to allow the People the opportunity to present any additional evidence they can uncover that can be used under current law to establish that these prior convictions qualify as strike convictions.

2. Recalculate Presentence Custody Credits

The parties agree that defendant is entitled to 1,908 days of presentence conduct credit, rather than the 1,781 days he was awarded. Section 2900.5 provides that a defendant sentenced to imprisonment is generally entitled to presentence custody credit calculated under section 4019. That allows a defendant to earn two days of additional credit for each two days served. Defendant was in custody for 954 days because he was arrested on October 2, 2014, and sentenced on May 12, 2017. Under this formula, defendant is entitled to 1,908 days of conduct credit. The court is directed to correct this error. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.)

DISPOSITION

The judgment is affirmed in part and reversed in part as follows: We reverse the trial court's true finding on the two prior strike conviction allegations. The trial court is directed to "review the record of conviction in order to determine what facts were necessarily found or admitted in the prior proceeding" and, based on those facts, to make a new determination on the prior strike conviction allegation. (*Gallardo, supra*, 4 Cal.5th at pp. 138-140.) Alternatively, if the prosecution elects not to retry the strike allegations, the trial court shall enter a "not true" finding. In any event, the trial court shall resentence defendant. The court is also directed to recalculate defendant's custody credits as described *ante*, prepare an amended abstract of judgment, and forward it to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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RAMIREZ

P. J.

We concur:

FIELDS

J.

MENETREZ

J.